Testimony of Professor Kiel-Brennan Marquez, Associate Professor and Faculty Director of the Center on Community Safety, Policing and Inequality, University of Connecticut School of Law; and Riley Breakell, student and research assistant, University of Connecticut School of Law

We write in support of HB 5390, a bill to repeal the provisions that allow the state to impose and enforce a lien against formerly incarcerated individuals.

State actions to collect on civil rights judgments in accordance with pay-to-stay conflict with federal civil rights law. In *Williams v. Marinelli*, 987 F.3d 188 (2d Cir. 2021), a jury found that former corrections officer, Marinelli, violated Williams's constitutional rights. The state of Connecticut voluntarily undertook to satisfy judgment on Marinelli's behalf, but paid nearly half of the $300,000 judgment directly to the Department of Administrative Services, pursuant pay-to-stay. According to the Second Circuit, this "irreconcilably" conflicted with the purpose underlying 42 USC § 1983, because the "deterrent effect of Williams's § 1983 award is eviscerated if both the constitutional tortfeasor [the prison official] and his employer, the State, are relieved of the bulk of the financial consequences of the violation" (pg. 201).

Williams's case is not unique. The worry about "evisceration" would apply to virtually all § 1983 suits against state officials, given Connecticut's exorbitant incarceration cost calculation, totaling more than $90,000 per year, per individual. At this cost point, most individuals serving prison sentences would have to secure damage awards of more than a quarter million dollars just to cover the full costs of their confinement in one suit. Further, many incarcerated individuals will, like Williams himself, also be subject to collection on other debts that cut deeper into their award, including CGS 51-298(b) debts for public defender services.

In aggregate, the chilling effect on § 1983 actions—a core mechanism of federal constitutional accountability—is likely severe. The Second Circuit was explicit about this risk, writing that it allowed "corrections officers from the day of [Williams'] imprisonment [to discount] the risk of suit against them," given the "diminished . . . likelihood that any recovery achieved by the prisoner" will actually be collected (pg. 201). The Court further acknowledged that the cost-of-incarceration debt applies to *all* incarcerated persons, "making it easier for officials to know *ex ante* that prisoners' civil recoveries will likely be reduced by operation of the Connecticut cost-recovery statutes" (pg. 201). For example—and not surprisingly—a recent lawsuit brought by an incarcerated woman who gave birth to her baby in a toilet ended in a relatively small settlement because the Attorney General's office reminded her that a jury trial would subject her damages award to an incarceration lien.

In addition to colliding with federal civil rights law, pay-to-stay statutes also run afoul of the U.S. Constitution. A lawsuit recently filed in the District of Connecticut, *Beatty v. Lamont*, CV-00280-JAM (Mar. 14, 2022), argues that liens generated by the pay-to-stay statute are, in effect, excessive criminal fines—a category of punishment explicitly forbidden under the Eighth Amendment. Indeed, it is difficult to conceptualize pay-to-stay debts as anything other than excessive fines. The assessed cost of incarceration is over $90,000 per year, nearly *five times* the

maximum enumerated fine that felonies can trigger in Connecticut ($20,000). This disparity may be excessive per se—but especially when the magnitude of the fine bears no relationship to the nature or culpability of the underlying crime.

Pay-to-stay also offends "fair notice" principles enshrined in the Fifth and Fourteenth Amendments. Incarcerated people are not informed of their assessed cost of incarceration is prior to or after their sentence. "Notice," such as it is, only occurs when the State decides—sometimes many years after release—to bring an action to collect. When the State imposes an assessed debt on an individual for the cost of their incarceration as a component of punishment, the individual should be notified with an explanation of the cost calculation and have an opportunity to challenge the imposition of the debt through normal judicial channels.

In sum, that pay-to-stay exists in tension with civil rights and Constitutional law draws out its inherent incompatibility with core tenants of criminal law. The state enjoys prosecutorial discretion in selecting who to bring charges against and which charges to bring. This is a position of sovereign privilege, not monetary benefaction; there is no unjust enrichment when someone is put behind bars. We determine through the democratic process which activities are criminal and how the state should seek to confer and administer punishment. Democratic principles demand that we all share in those determinations' costs.